It is critical to the process of regulators ceding control to the market that enforcement not become a solution in search of a problem that has not yet been *identified.* Neither should we suggest that we do not *need* a problem to solve in order to justify imposing additional regulatory burdens on market participants, simply because we believe those requirements may benefit consumers. If such an unprincipled approach were valid, there would be no limit to the requirements we could impose on carriers in the name of consumer protection. Indeed, the sad irony of imposing such unnecessary requirements is that doing so would thwart Congress' directive that we use competitive markets and deregulation to benefit consumers.

Having expressed these reservations, I look forward to working with my colleagues to ensure that consumers have access to knowledge that will truly help them make more informed buying decisions.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: First report and Order and Further Notice of Proposed Rulemaking, Truth-in-Billing and Billing Format; (CC Docket 98-170).

I dissent from the adoption of this item and write separately to express my many concerns about this agency's direct involvement in commercial billing issues. I have deep reservations about the extent of the Commission's authority over the commercial relationship between carriers and their customers. In particular, I am not convinced that the Commission possesses specific statutory authority to regulate a bill's description of that commercial relationship, or even the truthfulness of that communication. Apart from the question of statutory authority, I also view this exercise as an unwise use of limited Commission resources.

With particular respect to regulation of federal charges, I noted in the original Notice of Proposed Rulemaking my apprehension that carriers might be pressured, even indirectly, to remove or alter current line items or charges. I also objected to any suggestion that carriers had actually misrepresented any facts related to federal charges. Indeed, as I have stated before, while the government does not require a particular method of recovery, it has mandated payment of the underlying contributions by the carriers.[1] Regrettably, today's Order assumes that some carriers have misrepresented facts on bills and that the Commission thus must take prescriptive action to address those misrepresentations. I disagree with the premise that any carrier has acted to mislead its consumers.

In fact, it is this agency's attempt to distance itself from certain federal charges that qualifies as misleading. Despite its best efforts, the Commission cannot deny that the underlying charges to the carriers are mandated by the federal government, even if the method of recovery has not been regulated. A "full and non-misleading" "Truth-In-Billing" Order would recognize the rights of carriers to inform their customers that these charges are indeed federal requirements adopted by the FCC, and that the Commission expressly allows carriers to recover these charges directly from consumers. As described below, it is this Commission's desire to hide that very fact from consumers that has precipitated this "Half-Truth in Billing" Order.

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[1] "[N]o carrier should have its billing information restricted or limited by the Commission. The Commission has explicitly provided carriers with the flexibility to decide how to recover their payments, including as charges on consumers bills, and I am concerned by implications that such charges are fraudulent or misrepresentations." *Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, rel. May 8, 1998.

Regulation of descriptions for charges when there is nothing factually inaccurate about the carriers' statements -- but their description does not reflect the government's preferred explanation of the charges -- raises grave First Amendment questions. This Order's attempt to regulate speech regarding the universal service charges involves, in my view, censorship of speech integrally related to a political dispute over social policy and taxation. Given the lack of clear statutory authority to adopt these regulations, the prudent course would have been to avoid -- and not to create -- these constitutional problems.

I. The Legal Authority for These Billing Requirements Is Questionable, And The Order's Underlying Assumptions Contradict The Telecommunications Act's Deregulatory Mandate.

I have serious questions about the extent of the Commission's legal authority to regulate the commercial relationship between carriers and their customers, as well as the wisdom of this use of limited Commission resources. The majority relies in part on its authority under section 258 of the Act to adopt verification requirements to deter slamming. The majority contends that these requirements are "intended to function as a critical component of the Commission's verification procedures." *Supra* at para. 23. But the Commission only recently adopted verification procedures, along with liability rules, that have only recently started to take effect.[2] Before enacting these additional burdens on carriers, perhaps the Commission should have tried to determine the adequacy of its existing verification requirements.

Moreover, as the majority acknowledges, the Commission has even less statutory authority for the regulations regarding standardized federal labels than it does for its verification rules. *Id.* at para. 21 ("We recognize, however, that the standardized label guideline rests exclusively on our statutory authority under section 201(b) and therefore is limited to interstate services.") Section 201(b) simply provides: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . . ." The majority explains that the "principles and guidelines established in this Order are intended to define more specifically what would constitute a violation of section 201 in the billing context for the covered carriers." *Supra* at para. 24. But with regard to the various federal line items, it is not clear to me that any of the cited line items or their corresponding charges are either unjust or unreasonable.

For example, the majority states that carriers have labelled the fee related to universal service as "Universal Connectivity Charge," "Federal Universal Service Fee," "Carrier Universal Service Charge," and "Local Service Subsidy." *Id.* at para. 51. The Commission does not claim that any of these labels are inherently unjust or unreasonable; indeed, it does not even claim that any of the labels in the record are actually misleading. Neither does the

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2 *See 1998 Slamming Order and Further Notice*, CC Docket No. 94-129 (Rel Dec. 23, 1998).

Commission assert that the corresponding charges, which have ranged from $.93 per bill to 5% of the customers net interstate and international charges, are unjust or unreasonable. Given the utter failure to find either the labels or the charges "unjust or unreasonable," it is difficult to see how the regulations concerning standardized labels could be adopted since section 201(b) is the sole source of authority cited by the Order.

In addition, I disagree with the premise of the Order that "[e]ven in competitive markets, . . . disclosure rules are needed to protect consumers." *Id.* at para. 7; *see also id.* at para. 6 ("[A]t this time, competitive pressures alone do not ensure that consumers receive clear, informative and consumer-friendly telephone bills from certain carriers."). I do not believe that increased competition can ever be the impetus for further regulatory action by this agency. Indeed, Congress intended just the opposite. Both the Section 10 forbearance requirements and the Section 11 biennial review provisions are founded on the assumption that as competition increases, the need for regulation decreases.[3] Through these and other provisions of the 1996 Act, Congress made clear its intention that the Commission remove regulations as competition develops. We are not supposed to increase regulation in response to competition, as this Order does.

II. This "Truth-in-Billing" Order is Internally Inconsistent, Arbitrary, and Misleading.

This Order is riddled with internal inconsistencies, arbitrary distinctions, and misleading statements. For example, I am still confused as to which billing requirements apply to wireless carriers and which do not. These requirements, of course, are not a small matter. The Order states that the "*broad principles* that we adopt to promote truth-in-billing should apply to all telecommunications carriers, *both wireline and wireless.*" *Supra* at para. 12 (emphasis added). The majority explains that these "principles" apply to all carriers because they "represent fundamental statements of fair and reasonable practices." *Id.* The majority concludes that "[l]ike wireline carriers, wireless carriers also should be fair, clear, and truthful in their billing practices. Consumers deserve no less." *Id.* Thus, the majority concludes that these principles are enforceable as just and reasonable practices under section 201(b). *Supra* at para. 24 ("The principles and guidelines established in this Order are intended to define more specifically what would constitute a violation of section 201(b) in the billing context for the covered carriers.")

Comparison of the principles with the actual rules is an interesting exercise. The Commission's second principle, clearly applicable to wireless carriers, requires "that bills contain full and non-misleading descriptions of charges that appear therein." *Id.* at para. 5.

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[3] For a fuller discussion of my view on some of these requirements, for example, see my *Report on Implementation of Section 11 by the Federal Communications Commission* (Dec. 21, 1998), which can be found on the FCC WWW site at <http://www.fcc.gov/commissioners/furchtgott-roth/reports/sect11.html>.

The rule implementing that principle, technically applicable only to wireline carriers, requires that "[c]harges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered." The principle is, of course, virtually indistinguishable from the rule; it is hard to see how the obligations could differ. But, wireless carriers are expressly *exempted* from the rule. *See id.* at Appendix A ("[R]ule 64.2001(b) . . . shall not apply to providers of Commercial Mobile Radio Service."). Is that some indication these obligations should not, under any circumstances, apply to wireless providers? These conflicting statements make it unclear whether the bills of wireless providers must contain full and non-misleading descriptions, or not. While full and non-misleading description are not required of wireless providers under the rule itself, it appears that wireless carriers would be in violation of a fundamental fair and reasonable practices if they nonetheless failed to provide them. But if the descriptions are required in any event, why has the Commission bothered to exempt wireless carriers from the implementing regulation?

In short, when one compares the text of the "principle" with the text of the "rule" based on that principle, it is clear that they are almost identical. Yet, the majority apparently gives this distinction some meaning, as it chooses to apply the principle to wireless carriers but simultaneously exempts wireless carriers from the rule. At the same time, the majority refuses to explain exactly what effect, if any, this exemption will have. Are wireless carriers required to provide full and non-misleading descriptions of charges on their bills or not? Can a consumer file a complaint against a wireless carrier for failing to provide such a description or not? *These are not unreasonable questions, the answers to which should be readily apparent from a "clear and non-misleading" FCC Order.* Wireless carriers, and their consumers, are entitled to know what requirements are being placed on them by this agency.

The only real distinction that I can discern between the principle applicable to wireless carriers and the rule that exempts them is a practical one relating to the proper pleading of a complaint against a wireless carrier. A consumer who objects to a wireless carrier's failure to include full and non-misleading descriptions of the charges on his bill and who files a complaint under rule 64.2001(b) will be denied relief. The same complaint filed against a wireless carrier as an unreasonable practice pursuant to section 201(b)[4], however, would necessarily succeed, as the Commission has already determined that including full and non-misleading descriptions of the charges on a bill is "fundamental to a carrier's obligation of reasonable charges and practices." *Supra* at para. 37. The majority goes even further in stating that "we find it difficult to imagine any scenario where payment could be lawfully demanded on the basis of inaccurate, incomplete, or misleading information." *Id.*

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[4] The majority expressly states that "such [CMRS] providers remain subject to the reasonableness and nondiscrimination requirements of section 201 and 202 of the Act, and our decision here in no way diminishes such obligations as they may relate to the billing practices of CMRS carriers." *Supra* at para. 19.

Neither does this essentially ephemeral distinction between principles and rules alter the burden of proof. The majority has already determined that its billing principles are based on fundamental fairness and, as such, always apply. How could the Commission allow wireless carriers to fail to provide fair and reasonable practices? Could the Commission decide that wireless consumers "deserve less" than "fundamental[ly] fair and reasonable practices?" I doubt it. Would a defending wireless carrier instead need to demonstrate that the provision of full and non-misleading descriptions is not necessarily a fundamentally fair and reasonable practice? If a carrier could ever make such a showing, then the provision of "full and non-misleading descriptions" would not always be necessary to maintain fair and reasonable practices. But the majority's very justification for adopting these principles is that they are "fundamental principles of fairness to consumers and just and reasonable practices by carriers." *Id.* at para. 5. Admitting that such a showing could be made would thus undermine the justifications for adopting the principles in the first place. By refusing to clarify that such a complaint against wireless carriers must be accepted and instead maintaining the exemption for wireless carriers, the Commission signals that -- at least in the wireless context -- consumers indeed could "deserve less" than "fair, clear, and truthful . . . billing practices." *Id.* at para. 12.

I am astonished that the majority would go to such extremes to exempt an industry from a particular rule, while still requiring compliance with an identical "principle" as a reasonable practice. For what purpose are they making this distinction? The problem appears to be, in part, the result of the Commission's vague use of the word "principles" to describe specific requirements. Moreover, these "principles" are not voluntary, but enforceable as fair practices under section 201(b). *Supra* at n. 14. For all practical purposes, then, these principles are rules of conduct, and materially indistinguishable from the actual rules adopted.

I am left to conclude that this Order is more than just confusing due to its internal inconsistencies; it is intentionally "misleading," at least to the extent that it implies that some of these requirements do not actually apply to wireless carriers. Either that, or it has simply failed to be "full and non-misleading" in informing wireless consumers that their rights under section 201(b) have been diminished and that a complaint alleging that a carrier has failed to conform to practices that the Commission has declared fundamentally fair may be denied on its face. Surely consumers, and all of the industries to which these regulations apply, deserve more than the "half truths" and doublespeak of this Order.

Similarly, it seems arbitrary for the majority to conclude that wireless carriers should be subject to one of the rules implementing the second principle -- namely, that the requirement of standardized labels for charges resulting from federal regulatory action, *supra* at para. 18 -- while at the same time exempting them from the guideline/rule that merely repeats the general principle. *Compare id.* at para. 18 *with* Appendix A. If the general "principle of full and non-misleading descriptions also extends to carrier charges purportedly

associated with federal regulatory action," *id.* at para 49, and wireless carriers must use standardized labels in the interest of "full and non-misleading descriptions," then how can the Commission simultaneously exempt wireless carriers from rule 64.2001(b)'s implementing requirement that bills contain "brief, clear, non-misleading, plain language descriptions"? Should not a carrier be subject to a more general requirement before it is subject to a specific rule implementing the requirement? Again, this Order is at best "confusing" and at worst arbitrary in its application and justification of its regulatory scheme.

Finally, I believe that this Order is "misleading" -- and certainly not "full and non-misleading" -- in refusing to recognize the rights of carriers to inform their customers that the underlying federal charges are indeed federal requirements, mandated by the FCC. The Commission expressly allows carriers to recover the amounts associated with these charges directly from consumers. Despite its claims to the contrary, the charges appearing on consumers' bills *are* the result of *this* agency's requirement that carriers "contribute" to the universal service fund at a specified level. Recognizing our own role in these charges, now appearing on consumers' bills, would be the truly "non-misleading" approach.

In sum, I can only conclude that the Commission has been arbitrary either: (i) in the adoption of these requirements, since it refuses to apply its understanding of "fundamentally fair and reasonable practices" across the board to all carriers; or (ii) in the application of its rules only to particular carriers, while requiring all other carriers to abide by identical principles. Either way, it appears that the Commission has acted arbitrarily and capriciously in adopting and applying these binding principles and rules. Moreover, this Order is at least as "misleading" and "confusing" as many of the charges and practices about which the Commission complains. It is ironic indeed, that this agency's "truth-in-billing" initiative could not even pass its own standard for "brief, clear, non-misleading, plain language description[s]" with regard to the regulations that it imposes.

III. The History of the Universal Service Program and "Truth-In-Billing"

What disturbs me most about this Order are the Commission's underlying motives for regulating carriers' descriptions of federal charges: namely, that the majority does not want to be associated with the taxes they themselves have established, and that they are angry with carriers who have informed consumers about the tax and the majority's involvement with it. As one high ranking Commission official warned at the time these taxes were originally imposed, "Carriers better sharpen their pencils and think twice about what they're putting on customers' bills and attributing to government action." *Some MCI Customers Seeing Surge in Phone Bills*, Washington Post, January 31, 1998 at page H-3.

This story begins with the Commission's development of the schools and libraries

program. In a May 1997 Order, the Commission "requir[ed] phone companies [to] make . . .[a universal service] 'contribution' for the social good of wiring schools and libraries to the internet. . . . [T]he companies will have to hand over $2.25 billion in extra charges for the wiring cause." *New Phone Tax*, Wall Street Journal, December 9, 1997.

In December of 1997, I first noted my concern that the Commission was pressuring carriers not to place line-items for these charges on their consumers' bills.[5] At the time, it was widely reported that the "Commission prefers that [universal service costs] be rolled into rates,"[6] and that the FCC was irate with companies that planned to pass this tax through to consumers:

> The FCC is angry at companies that plan to disclose those costs to customers as a line item on the monthly bill. "They don't want us to call it a tax," [said one industry representative]. "But that's what it is."

A New Tax for the New Year, The Washington Post, December 2, 1997.

I objected to the Commission's efforts to hide this tax from consumers, making clear that "I do not share such a preference or endorse such efforts. . . . No carrier should have its billing information restricted or limited by the Commission."[7] Indeed, I believe that consumers have a right to know when they are paying federal charges; the Commission should not discourage companies from placing federal universal service charges on their bills. Line items for new taxes are a means of letting customers understand why rates are not lower than they would have been absent the new taxes. These line items are not a means of promoting "hidden rate increases," as some have called it. To the contrary, the only "hidden rate increases" here are those that result from obscured and unexplained taxes.

For consumers, the issue is not just whether prices have gone up or down. The question is whether prices would have been lower without the new tax. Only in Washington could explicit disclosure of this new tax be considered deceptive. Depriving consumers of information about new taxes demoralizes a democratic society.

Despite the benefits of fully informing consumers about government-mandated charges, "[t]he administration, which has touted the [schools and libraries] program as the centerpiece

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5 *In the Matter of Federal-State Joint Board on Universal Service*, Third Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 22801, 22814 (1997) (Dissenting Statement of Commissioner Furchtgott-Roth).

6 Monday December 8, *Communications Daily*.

7 *In the Matter of Federal-State Joint Board on Universal Service*, Third Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 22801, 22814 (1997) (Dissenting Statement of Commissioner Furchtgott-Roth).

of President Clinton's education goals, would rather that customers not know." *Itemized list of phone fees hotly debated*, USA Today December 15, 1997 at B-12. So, it was reported, "the FCC . . . had been pushing hard to get major long-distance carriers to agree not to put line-item charges on residential phone bills at least until July." *FCC Postpones Ruling on Internet Connections*, Washington Post, December 13, 1997 at F-9. These efforts were designed to "mask [the tax] for a while, to take some pressure off from the Hill." *Id.* For the first few months of the program, the Commission even "decided to reduce the [initial universal service] charges after the carriers said the fee could lead to higher rates and after AT&T and MCI threatened to specify the charge on the bills they send to customers." *Fund to Aid Technology in Schools Facing Big FCC Cuts*, New York Times, December 15, 1997 at D-1. Apparently, "the agency worried that if millions of Americans began seeing such fees on their bills, popular support for deregulating the telecommunications industry could begin to erode." *Id.* At this point, most large carriers began to place the line items only on bills for commercial customers, declining to specify the charges on bills for residential customers.

Last spring, the general issue of line items for schools and libraries "contributions" arose again when the Commission began to consider raising the funding level for the schools and libraries program. By then, many carriers had announced that they would recover these costs through separate line items on individual consumers, such as residential customers. Again, these announcements angered some at the Commission. *See, e.g., Statement of Chairman William E. Kennard on AT&T Long Distance Announcement*, May 28, 1998 ("AT&T's announcement is premature, unwarranted and inconsistent with their own public proposals to the FCC. This announcement suggests that AT&T will raise rates to pay for universal service."); "*AT&T adding surcharges; FCC Furious*," USA Today, May 29, 1998 at 2 ("The FCC is livid.").[8]

Immediately after carriers announced their intent to place line items on residential bills, the Commission announced its plan to initiate the instant "truth-in-billing" proceeding. *Schools, Libraries, Health Care Discounts Program Faces More Scrutiny*, Washington Report, June 15, 1998 (Commissioners "said they plan to adopt a notice of proposed rulemaking to help clear up consumer confusion about new rates and fees attributed to the discount programs").

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[8] *See also FCC Caught in Middle on Rate Rise*, June 11, 1998 at C-3 ("The FCC had hoped that long distance carriers would absorb the costs of the program, . . . But AT&T Corp., MCI Communications Corp. and other carriers plan to levy new charges, . . . "). *See Generally, Some MCI Customers Seeing Surge in Phone Bills*, Washington Post, January 31, 1998 at page H-3 ("FCC officials are upset about being blamed by MCI for the new charges. The agency maintains that the universal service fees are technically charged to local phone companies, . . . which are authorized to seek compensation from long distance carriers. It's up to MCI and other long-distance companies to decide how to pay, the FCC contends.").

Even worse, in the view of some at the Commission, opponents of the tax were blaming not just the Commission for the imposition new consumer charges, but also the current Administration, which strongly supported the schools and libraries program. As one news magazine reported:

> [The Vice President's] biggest high-tech achievement to date is a program to wire every classroom and library in the country. . . . But right now the program is under assault from congress as an out of control entitlement engineered by an out-of-control bureaucracy. Which does not do much for Gore's reputation as the architect of reinventing government. Even more ominous is another threat: starting this summer phone companies that were ordered to pay for the program are threatening to add a new charge to the long distance bills of residential consumers. Critics are already calling it the Gore Tax.

TIME, Karen Tumulty & John Dickerson, *Gore's Costly High Wire Act*,at 52, May, 25 1998.[9] Others even claimed the schools and libraries program had been initiated in order to enhance the chances of possible presidential candidates, arguing that it was

> nothing less than a stealth campaign to enhance Gore's presidential prospects. "This was not to be a political cash-grant program so that Al Gore can run for President, [one Congressman] complain[ed]."

Id. at 55.

Toward the end of 1998, an investigation by the United States House of Representatives confirmed the Commission's attempt to prevent carriers from associating the federal government with these charges:

> It is clear that the FCC pressured and threatened long distance carriers in an

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[9] *See also, id.* ("The blame inevitably finds its way to Gore, whose hands many see in virtually everything the FCC does."); *A New Tax for the New Year*, The Washington Post, December 2, 1997, ("The Internet in-the-schools idea was hatched by Vice President Gore and his friend Reed Hundt, the recently departed FCC chairman. They consistently tout the benefits of the program, but not its costs."); *Senators tell FCC "Gore tax" too costly*, The Washington Times, June 11, 1998 at B-9 ("Lawmakers said the FCC overreached its mandate by setting up a $2.25 billion fund to wire schools and libraries, which critics have dubbed the "Gore tax" because of Vice President Al Gore's vigorous support of the program. The issue came to a head this week after long-distance companies said they would start adding about $1 a month to consumers' bills to fund the program."); *Phone Wars leave FCC in a Political Combat Zone*, The New York Times, August 13, 1998 at D-1 ("When a dispute arose over the commission's plan to raise money to subsidize internet connections for schools and libraries, the fees were immediately labeled the "Gore tax" on Capital Hill.").

> inappropriate manner from taking action regarding how long distance carriers would recover their contributions to universal service from their telephone subscribers. The FCC was apparently motivated to exert such pressure to fulfill the Administration's political agenda to connect every classroom in the United States to the Internet by the Year 2000, and to do so while hiding the costs of their agenda from the American public.

Hill Report Finds FCC Threats, political Acts Against AT&T and MCI, Communications Daily, November 30, 1998.[10]

At bottom, I fear that this agency has only decided to regulate the description of federal charges because many carriers went "against the FCC's wishes and itemiz[ed] the phone tax." *New Phone Tax*, Wall Street Journal, December 9, 1997. That is not a legitimate reason for regulation, as either a policy matter or from a First Amendment perspective. I turn to the First Amendment issues below.

IV. The Standardized Labeling Requirements for Universal Service Charges Raise Grave First Amendment Questions.

I believe that the "standardized labeling" regulations for universal service charges, in particular, raise serious questions under the First Amendment. These regulations involve censorship of speech integrally related to a political dispute over social policy and taxation. As such, I believe they govern speech that is not merely commercial but political as well, and that they are thus presumptively unconstitutional. In any event, contrary to the Order's assertions, the standardized labeling regulations do not pass muster under the test for regulation of purely commercial speech.

A.

At the outset, some important facts must be clarified. The Commission repeatedly emphasizes in this Order that it has "not mandated or limited specific language that carriers

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[10] Finally, I note that the timing of this Order is curious. It is no coincidence that the majority seeks to strengthen its ability to keep these taxes at arms-length at the same time that the Commissions is considering raising this tax by an additional $1 billion. *See, e.g., FCC Mulls Boosting Internet Funding for Schools, Libraries*, Wall St. Journal, May 5, 1999, at B6. Association with this tax becomes increasingly damaging, as a political matter, the higher the tax is. Also, the act of substantially increasing the schools and libraries charge might well reinvigorate the debate over who should be blamed for this entire matter. *School Internet Discount Slated For More Money - and Dissension*, Washington Post, May 6, 1999 at E-3 ("Yesterday's announcement may generate new controversy among telephone companies and Republican lawmakers who have called the program the "Gore Tax" because it is the vehicle for Vice President Gore's promise to wire all of America's classrooms to the Internet.").

utilize to describe the nature and purpose of [universal service] charges." *Supra* at para. at 56. The Commission has done *precisely* that, however, with respect to the labeling of the charges. It issues today a proposed list of acceptable words for characterizing the charges on line items and presumably will issue a final list in the future. *See supra* at para. 71. In addition, this Order appears to prohibit any line items that indicate the charge is federally-mandated or federally-imposed.[11] Surely, this action "limit[s]" the "specific language" that carriers may use when speaking about the charges. Conversely, and by necessary implication, the Commission bans all words other than those on the approved list, including wholly truthful and non-misleading speech.

To be sure, the Commission will permit carriers to use additional language to describe the charge (so long as that description is not "misleading," a limitation discussed below). But that does not erase the fact of the restriction on permissible labels. As the Commission acknowledges by its direct regulation of the line item as opposed to other text on the bill, consumers tend more to focus on the line items than on footnoted material at the bottom of the page.

Moreover, the Supreme Court has rejected the argument that limitations on commercial speech are permissible just because the government leaves open alternative modes of communication. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977) (applying strict scrutiny to ban on commercial speech notwithstanding fact that other modes of communication were unaffected by the ban); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The Court has also rejected the argument that content-based restrictions -- which these regulations undoubtedly are -- become permissible when speech alternatives exist. *See Consolidated Edison Co. v. New York*, 447 U.S.530, 541 (1980) ("[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.") (citing cases).

It is also plain from today's Order that any additional language that carriers may wish to include must be "non-misleading" in the Commission's eyes. *See supra* at para. 55. If the Commission believes that it would be "deceptive" to tie the charge to the Commission or the federal government, as it apparently does, then the companies have been afforded no

[11] Although the Order discusses the prohibition on terms such as "federally-mandated" in the specific context of the additional language that carriers may include, *supra* at para. 56., the underlying assumption of the Order seems to be that such a description would be equally unlawful if used as a label on a line-item. Under the reasoning of this Order, which concludes that a description of universal service charges as mandated by the federal government is misleading, it would seem that a line item conveying the same message would be an unreasonable practice in violation of section 201(b).

meaningful outlet at all. *See id.* ("We would not consider a description of [the universal service] charge as being 'mandated' by the Commission or the federal government to be accurate."). It is undeniable, as a matter of fact, that the charge has been "mandated" by the Commission. The only *possible* question could be upon whom the Commission directly levied the charges. Thus, the Commission's argument seems to hang on the slim reed that omission of the fact that the charges were directly levied on carriers, as opposed to being levied directly on consumers, is "misleading" in that it does not expressly tie accountability for the charges to the carriers. Indeed, it is not even clear from the face of this Order that carriers could simply state that they were recovering from consumers charges imposed upon them by the Commission -- an entirely accurate statement, even on the Commission's theory of the charges.

To my mind, the assignment of responsibility for these consumer charges seems less a question of pure fact or "truth" than opinion. As with most questions of opinion, it is one about which reasonable people can disagree.[12] Some carriers possess a reasonable belief that the Commission, by levying a fee on carriers, was the "but-for" cause of the appearance of these charges on consumers' bills. In a competitive market, they say, costs are by definition passed through to consumers, and so the imposition of new regulatory charges on carriers is tantamount to a charge on consumers. As long as the carriers are subject to the Commission's understanding of "misleading" statements with respect to the charges, however, they will presumably be forbidden by this agency from expressing to consumers their view that the fees imposed in connection with the universal service fund are the result of government action and that ultimate responsibility for these charges rests with the government. By choosing the very words that may be used to label federal charges, these regulations "attempt to give one side of a debatable public question" -- here, the government view's about who should be held responsible for these charges -- "an advantage in expressing its view to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994).

Indeed, given that carriers who highlight the charges must employ terms that prevent them from disclaiming responsibility for the charges, carriers have every incentive to omit the line-item altogether. Faced with a choice between expressly identifying the charges on bills in the government's terms and not raising the issue at all, carriers "might well conclude that, under these circumstances, the safe course is to avoid controversy, thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *Pacific Electric &*

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[12] In the 1980s, for instance, President Reagan and the Democratic Congress disagreed over whether his tax plan represented a cut in spending, as opponents of the plan thought, or merely a cut in the increase of spending, as he argued. Reasonable people could, and did, disagree about how the plan should be characterized. And yet what if government had restricted parties impacted by the proposal from calling it one thing or the other -- requiring, for instance, that the plan only be referred to in certain documents as "a cut in the increase of spending"? That seems unthinkable, yet all too similar to the instant situation.

Gas Co. v. California, 475 U.S. 1, 14 (1986) (internal citation and quotation omitted). In this way, the regulations discourage speech about the charges altogether.

In sum, these regulations undoubtedly constitute a limitation on the speech that may appear on line items in bills: legally permissible language is confined to that which appears on the Commission's list. Conversely, these regulations prohibit all line-item speech regarding the charges that does not appear on the list. While the Commission loudly proclaims that carriers are "free" to provide descriptions of the charges in addition to the standardized labels, it is clear that those descriptions will be subject to rejection by the Commission on the basis that they "untruthfully" point the finger of blame for the charges at the federal government. Finally, given that speaking about the charges on line items requires the use of the government's terminology, the scheme deters carriers from speaking in the first place. For the reasons that follow, this approach to the regulation of carriers' speech is in significant tension with the First Amendment.

B.

In this Order, the Commission applies the First Amendment test for limitations on commercial speech first established in *Central Hudson.*[13] That test, however, has been further developed and strengthened in subsequent cases. As I read commercial speech doctrine, the regulations are of dubious validity.

1.

"It is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.' "*Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20 (1983)). Specifically, the government must "*demonstrate* that the harms it recites are *real* and that its restriction will *in fact* alleviate them to a *material* degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (emphasis added). The Supreme Court has expressly "cautioned that this requirement [is] critical; otherwise, '[government] could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane,* 507 U.S. at 771).

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[13] By applying the three-part test from *Central Hudson*, the Order appears to presume that the speech at issue is not inherently but only potentially misleading. I think it open to challenge whether the speech at issue -- *i.e.,* labels or descriptions such as "FCC-mandated" -- are indeed potentially misleading. *See generally infra* at Section III. By assuming that the relevant speech is *at most* only *potentially* misleading, however, the Order does not deny that it is protected by the First Amendment.

Here, there is no proof sufficient to meet the standard set in *Edenfield.* To the contrary, this Order contains nothing more than unsupported assertions of a theoretical link between the Commission's action and its effect on the beliefs and resultant behavior of consumers. Consider the entirety of the Order's reasoning on this point:

> The proposed regulation will ensure that the labels assigned to charges related to federal regulatory action are consistent, understandable, and do not confuse or mislead consumers. In addition, the regulatory scheme will encourage carriers to provide consumers with information that will enable them to understand their telecommunications bills, and prevent carriers from misleading consumers into believing they cannot "shop around" to find carriers that charge less for fees resulting from federal regulatory action.

Supra at para. 61. This paragraph is composed of a string of conclusions -- not a demonstration of real harm or an explanation of the ways in which the regulatory scheme will actually and materially remedy that harm.[14]

Specifically, where is the evidence that telephone customers will be perplexed by a description of the charge as an FCC-mandated, or federally-required, fee?[15] (I suspect the American consumer would understand this explanation all too well.) In fact, there is no record that any carrier has even *used* such a label. *See id.* at para. 51. What is the basis for the assertion that any confusion resulting from the use of the banned labels would result in consumers' belief that the fee is nonvariable from company to company? Further, what proof is there that any such belief that materialized in the minds of consumers would prevent them

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[14] This same explanation is repeated for purposes of the first prong (the substantiality of the government's interest), and there it is phrased entirely in the conditional. "Line item charges are being labeled in ways that *could* mislead consumers by detracting from their ability to fully understand the charges that are appearing on their monthly bills, thereby reducing their propensity to shop around for the best value." *Supra* at para. 60 (emphasis added). "Consumers who are misled into thinking the charges are federally mandated . . . *could* decide that such shopping would be futile." *Id.* (emphasis added). "Lack of standard labeling *could* make comparison shopping infeasible." *Id.* (emphasis added). The theoretical *possibility* of harm, of course, is not sufficient to justify a restriction on commercial speech, as noted above. The substantiality of the government's asserted interest is thus also quite vulnerable to attack.

[15] To the extent the Commission seeks to rely on the number of phone calls received from consumers as proof of "confusion," *see supra* at para. 48 & n.29, that reliance is misplaced. The summary of complaints received does not distinguish between consumers who were confused by unclear charges and those disputing charges. My experience is that these consumers were not "confused" by the charges, nor were they under the misimpression that they could not shop around. Rather, they were angry about the imposition of what they perceived as a new federal tax. Moreover, this evidence does not adequately differentiate complaints about "cramming" and "slamming" from complaints about universal service charges.

from comparing long distance companies on the basis of price? Finally, what proof is there that the agency's hand-picked words will in fact, not just in theory -- and materially -- alleviate the posited harm?

Moreover, the Order does not even attempt to tie these various conclusions back to the "ultimate goal" of the regulation, "ensur[ing] that consumers pay fair and efficient rates." *Id.* at para. 60. Even if one assumed the soundness of each of the foregoing steps in the Commission's chain of logic, there is no explanation of how unfair or inefficient prices for telephone service would result from a consumer propensity not to shop on the basis of universal service charges. Does the Commission intend to suggest that it is "unfair" for consumers to pay rates that include these charges *in toto,* or that such rates would be "inefficient"? The Commission cannot mean that, however, because it expressly permits carriers to pass the charges on in full. *See Federal-State joint Board on Universal Service*, 12 FCC Rcd 8776, 9209 (1997). Also, the prices charged by these long distance carriers have been deregulated and are thus by definition efficient; the Commission itself states that "competition should ensure that [these charges] are recovered in an appropriate manner." *Supra* at para. 54. I cannot discern any connection in this Order between consumers' tendency to price shop on the basis of these charges and the ultimate fairness of rates.

In short, there is no record to support any of the Commission's suppositions regarding the way in which these regulations advance its posited goal of fair and efficient prices. The notion of consumer confusion from putatively misleading labels, and of the harms resulting from any such confusion, is entirely conjectural. The idea that the words selected by the Commission will cure that confusion is unfounded by any empirical reality. Nor is there any nexus between the consumer behavior that the Commission asserts will result from the use of certain labels and the ultimate goal of ensuring fair prices.

As explained above, the "direct advancement" prong "is not satisfied by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. at 770; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506 (1996) (lead opinion) (rejecting State's argument than ban on alcohol price advertising advanced its interest in temperance because State adduced "no findings of fact, or indeed any evidentiary support whatsoever"); *Ibanez v. Florida*, 512 U.S. 136, 146 (1994) ("If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden [of proof]"); *Zauderer v. Ohio*, 471 U.S. 626, 648 (1985) (rejecting State's asserted interest in ban on illustrations in advertising by attorneys because "[t]he State's arguments amount to little more than unsupported assertions; nowhere does the State cite any evidence or authority of any kind for its contention"); *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. at 95-96 (holding that record did not support respondents' "fears" that certain behavior would result if speech were permitted and did not confirm the "assumption that proscribing" speech would have the government's presumed effect).

The standardized labeling regulations bear other inadequacies under the "direct advancement" prong of *Central Hudson*. Close examination of the entire scheme reveals that it is structured so as to preclude direct advancement of the Commission's posited goal.

The Commission does not require line items for universal service charges, even for carriers that choose to recover these charges from end-users. Carriers who wish to include the entirety of these charges in their general rates, without breaking them out separately, are free to do so. *See supra* at para. 54 (carriers may decide "whether to include these charges as part of their rates, or to list the charges in separate line items"). Carriers who take this approach, however, would be just as able to "mislead" consumers into deciding not to shop around for providers that absorb more of the cost of the charges; their customers will *never know* that the charges are being passed on to them. Likewise, there would be no way for these customers to contrast the cost of these charges with those imposed by other carriers, since their bills would not specify the amount of the charges *at all*. If the Commission truly means to further uniformity and accuracy with respect to universal service charges so that consumers can compare the charges across bills and shop on that basis, then it makes no sense to permit carriers to conceal the charges in their general rates. This critical aspect of the regulations "directly undermine[s] and counteract[s] [the] effect of" the entire scheme. *Rubin v. Coors Brewing Co.*, 514 U.S. at 489.

Functionally, the lack of a requirement that carriers break out universal service charges in a separate line item allows any carrier that wishes to opt out of the labeling scheme. To qualify for this wholesale exemption, carriers must simply encompass the charges in overall rates. There is no requirement of disclosure regarding the existence or nature of the charges for carriers who elect this course, and there is nothing in the regulations that would prevent all carriers from doing so. As a general matter, broad exceptions that appear unrelated to the government's asserted interest create serious obstacles to an affirmative finding under the "direct advancement" prong. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. at 488 (holding that exceptions to labeling ban on malt beverage alcohol content for other kinds of alcohol rendered scheme irrational); *Valley Broadcasting v. FCC,* 107 F.3d 1328, 1334 (9th Cir. 1997) (holding that exceptions to casino advertising ban for other kinds of gambling undermined purpose of ban). It could easily be argued that this functional exception, which could easily swallow the rule itself, renders the regulatory support for the Commission's purposes "ineffective [and] remote." *Edenfield v. Fane*, 507 U.S. at 769.[16]

In the specific context of potentially misleading speech, the law also requires that "the

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[16] "[E]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. at 52. *See infra* n. 7 (discussing weaknesses in substantiality of Commission's posited interest).

record indicate[] that a particular form or method of advertising has in fact been deceptive" before it can be regulated consistent with the First Amendment. *In re R.M.J.*, 455 U.S. 191 (1982) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)). As explained above, there is no record proof that the use of labels such as "FCC-mandated" or "governmentally-required" has actually caused consumers to be misled into thinking that the amount of universal service fees charged to them was set by law. I am not aware of any instance of such labels actually being used -- and the Order certainly does not point to any -- and thus it hard to see what evidence there could be of actual deception. In contrast to other commercial speech cases, the record before us contains no "substantial and well-demonstrated" practice of misuse of certain titles for the charges. *Friedman v. Rogers*, 440 U.S. 1, 15 (1979).

For these reasons, I do not think that it can be said that the government has carried its burden of showing that these regulations will directly and materially advance the goal of ensuring that consumers will engage in price comparison on the basis of universal service charges among telephone carriers. Accordingly, the regulations appear vulnerable to invalidation by a reviewing court on this ground alone.[17]

2.

Since *Central Hudson,* the Supreme Court has also expanded upon the fourth prong of commercial speech analysis, the question whether the regulation is more extensive than necessary to serve the asserted interest. In *City of Cincinnati v. Discovery Network, Inc.*, the Court explained that although "[a] regulation need not be 'absolutely the least severe that will achieve the desired end,' . . . if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable." 507 U.S. 410, 417 n. 13 (1993) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).[18] Recently, the D.C.

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[17] Respectfully, I submit that the actual purpose of these regulations -- and a theory on which the entire plan hangs together perfectly -- is to discourage consumers from blaming this agency in particular or the federal government generally for this increase in telephone charges. *See generally infra* at Section III. Carriers who insist on breaking out the charges and listing them on a separate line, thereby bringing them to the attention of their customers, may only apply certain, government-approved labels to the charges, which discourages speech about the charges in the first instance. Other carriers, by simply including the charge in general rates, are free not to mention it at all. Either way, public discussion of the charges in bills is kept to a minimum; and, when the charges are discussed, they may not be closely tied to the federal government.

[18] Although the Commission relies on *Fox* in its Order, the interpretation of the fourth *Central Hudson* prong in that case was clarified in *City of Cincinnati,* as noted above. Moreover, in the subsequent case of *44 Liquormart, Inc. v. Rhode Island*, which produced no opinion for the Court, two Justices interpreted the fourth prong in an especially restrictive way, and one Justice would have jettisoned it altogether. *See* 517 U.S. 484, 524-25 (1996) (Thomas, J., concurring) (noting that application of fourth prong by Justices Stevens and O'Connor was stricter than traditional application and that, if their approach were adhered to, it would invalidate "restrictions on speech whenever a direct regulation . . . would be an equally effective method" of advancing the

Circuit extended the strict evidentiary standard of *Edenfield v. Fane*, which dealt with the "direct advancement prong," to this fourth and final prong. *See Pearson v. Shalala*, 164 F.3d 650, 659 n. 9 (1999) ("[W]e see no reason why the government's evidentiary burden at the final step of *Central Hudson* should be any less than at the direct advancement step.").

The standardized labeling regulations are susceptible to constitutional doubt under this last part of *Central Hudson* as well. In arguing that these regulations are narrowly tailored, the Commission asserts: "[W]e only prescribe that these charges be presented using a standardized label." *Supra* at para. at 62. This characterization overlooks entirely the burdens on speech imposed by the regulations. *See generally* Part IV. A. The regulations mandate not just standardization, as the Commission claims, but require carriers to use government-approved adjectives and nouns to characterize the charges in line items. By necessary implication, the regulations outlaw the use on line items of any and all other words, including accurate ones. Additional language that carriers include elsewhere on bills to explain the charges are subject to the Commission's limitation on "misleading" statements. Contrary to the assertion of the Order, the regulations clearly "limit[] specific language that carriers utilize to describe the nature and purpose of the charges." *Id.*[19] In terms of their impact on speech, the regulations are quite broad.

Yet, if ensuring that consumers can compare universal service charges across bills is the goal here, that aim could be fully achieved by a rule requiring standardization and nothing more. For instance, industry could agree to a certain phrase, and the Commission could simply require or encourage uniform usage of that phrase. Indeed, the Commission takes just that sort of non-interventionist approach to speech with respect to charges for services rendered. *See supra* at para. 42 ("Although we decline to formulate standardized descriptions, we encourage carriers to develop uniform terminology. . . We believe industry is better equipped than the Commission to develop . . . standardized descriptions that are compatible with the character limitations for text messages and other operational restrictions. . . .").[20] Given the stated goal of price comparison, there is no ostensible reason -- other than suppression of the point of view that the charge is a federal fee or even tax for which the government should be held accountable -- that the Commission itself would need to select or approve the words that can be used to describe universal service charges. That extra step is simply not necessary to serve the putative goal of uniformity.

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government's end).

[19] For these reasons, the Order's attempt to distinguish *44 Liquormart v. Rhode Island, see supra* at para. 63 ("[W]e ban no speech, so carriers remain free to develop their own descriptions of the nature and purpose of these charges, subject only to a labelling requirement"), is unpersuasive.

[20] Notably, the Order fails to explain why the reasons that counsel in favor of non-intervention on specific terminology when it comes to charges for services rendered are suddenly inapposite when it comes to universal services charges.

To the extent that the Commission is concerned that certain characterizations of the charges (specifically, those suggesting the charges are required by the government) will in fact "mislead" consumers into the decision not to price shop, the regulations are more burdensome than necessary to serve that goal as well. Instead of forbidding all speech except that which appears on its final list, the Commission could have allowed carriers to speak but prohibited misleading statements; that is, the presumption could have been in favor of speech, not against it. Case-by-case adjudication of the "truthfulness" of specific phrases used to describe the charges would be vastly less intrusive than the expansive, prophylactic rules adopted in today. The Commission's selection of a particular label or labels necessarily excludes a vast category of entirely truthful, nonmisleading ways of describing the charges on line items. *See generally Pearson v. Shalala*, 164 F.3d at 655 (explaining that government "may not place an absolute prohibition on ... potentially misleading information ... if the information also may be presented in a way that is not deceptive") (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)); *see also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. at 648-649 (holding that State's "unsupported assertions" were insufficient to justify prohibition on attorney advertising and that "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force").

In addition, the Commission has chosen to suppress speech instead of permitting the carriers to cure whatever confusion might be created by a label such as "federally-imposed" with more detailed disclosures regarding the nature and purpose of the fee. *See supra* at para. 59 (expressly "declin[ing] to specify any periodic notification to consumers providing additional explanation of any charges resulting from federal regulatory action" because "requiring standard labels" was sufficient action). As the D.C. Circuit has ruled, however, "[i]t is clear . . . that when government chooses a policy of suppression over disclosure -- at least where there is no showing that disclosure would not suffice to cure misleadingness -- government disregards a 'far less restrictive' means." *Pearson v. Shalala,* 164 F.3d at 658 Even assuming that it is potentially "misleading" to apply the words "FCC-mandated" to universal service charges on a line item, that would seem remediable by inclusion in the bill of a more complete explanation of the technical details of the charges. And the Commission cannot justify its rejection of disclosure on the grounds that it has already adopted the more restrictive approach; rather, the Commission must explain why requiring such periodic notification would not suffice to cure the alleged problem of misleadingness. Requiring more speech about the nature of the charges, instead of banning even potentially misleading short-hand names for them, is "a far less restrictive means" of combatting consumer "confusion" over the variability of the charges as among carriers.

Moreover, the direct approach of regulating the underlying conduct -- as opposed to the indirect approach of regulating speech about the conduct -- is also presumably available to the Commission. If the Commission believes that the cost of the universal service program should be borne by carriers alone, or that any charges that are passed on should be allocated

equitably, then it could (assuming statutory authority) have regulated carriers' recovery of the cost of these charges. *Cf. 44 Liquormart v. Rhode Island*, 517 U.S. at 507 (holding that State failed to "satisfy the requirement that its restriction on speech be no more extensive than necessary" because "higher prices can be maintained . . . by direct regulation"). But the Commission has expressly declined to regulate recovery of the charges, *see supra* at para. 49 ("[W]e decline . . . to limit the manner in which carriers recover these costs of doing business"), choosing instead to suppress speech regarding liability for the charges. Under the First Amendment, that is a highly problematic approach. *See generally 44 Liquormart v. Rhode Island*, 517 U.S. at 512 ("The First Amendment directs that government may not suppress *speech* as easily as it may suppress *conduct*, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends") (emphasis added); *see also id.* at 520 (Thomas, J., concurring) (noting emphasis in modern commercial speech caselaw on "the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly").

Finally, the Commission could have issued public notices or bulletins to increase public awareness of the nature of the charges. It could have explained publicly its view that universal service charges are imposed directly on carriers, that transfer of the costs to consumers is a "business choice" for carriers, and that consumers should use this information in evaluating carriers. *Cf. id.* at 507 (suggesting that public educational campaigns to combat the posited problem are less restrictive alternatives to speech restrictions); *see also id.* (citing *Linmark* for proposition that "State [could] use . . . counter-speech, rather than speech restrictions, to advance its interests"). On this record, there is no reason to think that such a educational campaign would be any less effective in terms of its impact on consumers' tendency to engage in price comparison than the scheme adopted in these regulations.

For the above reasons, the labeling regulations impinge on speech to a greater extent than needed to advance either the goal of uniformity or of deception, much less the "ultimate" goal of efficient and fair prices.

C.

While the regulations are highly questionable under commercial speech doctrine, I would dispute the characterization of the speech at issue as purely commercial. As the Court and individual Justices have repeatedly recognized, the commercial is often intertwined with the political. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (explaining that unless consumers are informed about the operation of commercial markets, they cannot establish "intelligent opinions as to how that system ought to be regulated or altered"); *44 Liquormart, Inc. v. Rhode Island*, 517 US at 520 (Thomas J., concurring) (observing that "[i]n case after case. . . the Court . . . [has]. . . stress[ed] . . . the near impossibility of severing 'commercial speech' from speech necessary

to democratic decisionmaking"). Although the majority struggles to contain the carriers' speech to the commercial category, I submit that speech about the nature and purpose of universal service charges is intensely political.

The facts of this case involve language on a telephone bill and thus, at first blush, might be considered purely commercial. But if one looks closer, it becomes clear that this speech does far "more than propose a commercial transaction." *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973). Nor does it constitute "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. Rather, the speech at issue -- brief descriptions of the origin and purpose of universal service charges -- attempts to identify to the consumer the cause and intended use of these charges. Accountability for charges that some consider a tax is not just a business matter, but a highly political one. Neither the government nor the telephone industry wants to be viewed by the public as the perpetrator or beneficiary of these new federally-related charges: for carriers it may be bad public relations, but for government officials it is bad politics. Few politicians welcome the opportunity to be associated with a new tax.[21]

The speech at issue may also involve explicit or implicit criticism of the charges by carriers. It may certainly trigger explicit, even vehement, criticism of the charges and the programs that they support by consumers.[22] Surely, discussion about the "true" nature of these charges -- whether on a carrier's bill or editorial page -- constitutes discussion of a public issue. As the Supreme Court has made clear: "There is no question that speech critical of the exercise of the [government's] power lies at the very center of the First Amendment." *Gentile v. Nevada*, 501 U.S. 1030, 1033 (1991).

The nub of these regulations is whether it is "misleading" for carriers to say that universal service charges are "FCC-mandated," "federally-imposed," or even that they are

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[21] The history of the underlying program and of carriers' billing policies reveals a deeply political debate, ranging from matters such as the importance of internet access in schools and libraries to the impact of the program on potential presidential candidacies. *See generally infra* Part III (documenting background of program and billing policies); *see also* TIME, *Gore's Costly High Wire Act*, at 52, May, 25 1998 ("What once seemed an unassailable idea is now ensnared in presidential politics, the byzantine working of phone deregulation and the design flaws of a funding scheme that camouflages the costs of a huge new federal program by putting it on people's phone bills.").

[22] *See, e.g.*, USA Today, Shocked by e-taxes, May 5, 1999 at 26-A: "The expenditure for computers is obscene. I want children to read, comprehend, write legibly with correct spelling and be able to add two and two without a calculator. . . . The wondrous part of all this is that a close look at your phone bill shows a charge on your long-distance calls to pay for this boondoggle. This is due to a tax instigated by Al Gore and the Federal Communications Commission. . . . My phone bill has a whole page of various little charges for nonsense. My base rate is $28 before any long distance calls. Thank you, big government."

simply recovering charges imposed on them by the FCC. With respect to the breadth of the Commission's prohibition on "misleading" speech, the General Counsel of this agency stated publicly that carriers would be flatly prohibited from describing the charges (even uniformly) as "politician X's tax." Transcript, *Commission Public Meeting*, April _, 1999, at __. This strikes me as a stunning limitation, from a First Amendment perspective. Referring to a fee, program, or tax as the creation of a particular government official, agency, or entity -- whether to claim credit or cast blame -- is not merely commercial speech. Such references involve core political expression.

Admittedly, the government can regulate the truth of facts in advertising. But, as suggested above, these regulations do not concern the accuracy of an objective, readily verifiable fact, one of the original justifications for regulation of commercial speech. *See Virginia Pharmacy Bd.*, 425 U.S. at 771 &. n. 24. Rather, these regulations involve politically charged speech, *i.e.* statements indicating who should be held responsible for the imposition of this charge on the American telephone consumer. Government assessment of the "truth" regarding its own responsibility for consumer charges is entirely different than government assessment of the accuracy of, say, a third party's interest rate quotation.[23] The incentives for governmental self-dealing and self-protection in the former case, at the expense of free speech about government activity, are obvious.

For the foregoing reasons, I do not believe that this Order "involv[es] *only* commercial speech." *Central Hudson v. New York*, 447 U.S. at 562 n. 5 (emphasis added). To the contrary, the speech governed by the labeling rules involves questions of governmental accountability for charges used to support federal programs. It thus "extends well beyond speech that proposes a business transaction . . . and includes the kind of discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages." *Pacific Electric & Gas Co. v. California*, 475 U.S. at 8 (citation omitted).

Accordingly, strict scrutiny -- rather than the more lenient scrutiny of *Central Hudson* -- might well apply to these regulations. Under that standard of review, it is doubtful that these regulations would survive judicial review. *See, e.g., Pacific Gas & Electric Co. v. California*, 475 U.S. 1 (holding that State could not require private company to include in its

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[23] The analogy to the Truth in Lending Act, *see supra* at para. 62, does not prove very much. First, the fact that the Act has not been challenged as violative of the First Amendment does not establish its constitutionality. Second, the question whether that statute possesses the required fit between means and ends is one that turns, in part, on the particular characteristics of that legislative plan; the answer to that inquiry may well be different than the answer here. Last, that Act requires disclosure of objective, readily verifiable information, such as the applicable annual percentage rate for credit transactions and the way in which rates are calculated. Requiring disclosure of that kind of information is a far cry from compelling carriers to convey a politically freighted message that is biased against the carriers' views. *Cf. Pacific Gas & Elec. Co. v. California*, 475 U.S. 1, n. 12 (1986).

bills messages with which it disagreed); *Consolidated Edison Co. v. New York*, 447 U.S. 530 (holding that State could not forbid private company from including in its bills inserts discussing issues of public policy).

D.

To sum up, I doubt that these regulations could survive either the third or fourth prong of *Central Hudson*. The Commission has not shown that the posited harms of consumer misunderstanding about the mandatory nature of the charges, and the purportedly consequent decision not to price shop, are real; that these harms have any causal connection to the goal of fair prices; and that regulation of the uniformity and truthfulness of descriptions of universal service charges will actually and materially advance that goal. Moreover, the Order's yawning loophole, which affords carriers the ability to opt out of the labelling rules altogether by not mentioning the charges on bills while still recovering the costs in per-minute rates, severely undermines the goal of allowing consumers to compare universal services charges. Worse, it has the effect of encouraging carriers not to speak about the charges in the first place. Finally, numerous and obvious alternatives to these sweeping, preventative speech restrictions exist.

Assuming for the sake of argument that these regulations are permissible under the *Central Hudson* test, I do not think that the speech governed by these rules can be made to fit in the "commercial" box. The regulated messages, which go to public accountability for these charges, are fraught with political significance. It is entirely possible, if not likely, that these regulations enjoy the full constitutional protections afforded speech regarding public issues. If that protection obtains, these regulations are presumptively violative of the First Amendment.[24]

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[24] The labeling regulations are troublesome under other strains of First Amendment precedent. First, they could fall as content-based restrictions, even if the speech at issue were found to be purely commercial. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), suggests that content regulation of speech -- even in the context of speech thought to be otherwise unprotected -- can still invoke strict scrutiny. Specifically, if the government restricts speech not for reasons related to the nature of the speech but in order to impose special restrictions on "those speakers who express views on disfavored subjects," strict scrutiny applies *Id.* at 391; *see also id.*. at 388-89 (suggesting that regulation of advertising would fall within the rule of *RAV* in certain circumstances); *44 Liquormart v. Rhode Island*, 515 U.S. at 512 n. 20 (noting that *RAV* held that "although the government had the power to prescribe an entire category of speech, such as obscenity or fighting words, it could not limit the scope of its ban to obscene or fighting words that expressed a point of view with which the government disagrees"). Here, the Commission has chosen to regulate as "misleading" only one subcategory of commercial speech on carriers' bills -- that relating to universal service charges which suggests the charges are federally required -- thus limiting the scope of its ban to those who express a point of view about the nature of the charges with which the Commission disagrees.

These rules also might be thought to impose a prior restraint on the speech of telephone companies. *See*

The Supreme Court has explained that "the First Amendment directs us to be skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart v. Rhode Island*, 517 U.S. at 503. We should be even *more* skeptical of the instant regulations: here, the government seeks to keep people in the dark not for their own good, but to protect its own vested interests. Governmental self-insulation from public criticism and accountability, by regulation of the "misleading" nature of private speech that seeks to attach responsibility for certain developments to the government, is antithetical to the values embodied in the First Amendment.

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Through this on-going rulemaking, companies must collectively "pre-screen" and vet their selection of line item descriptions with this agency, and those selections will ultimately be approved or rejected by the agency. In the D.C. Circuit, the applicability of prior restraint doctrine to commercial speech is an open question, *see Pearson v. Shalala*, 164 F.3d at 660, and it clearly applies to core speech.

In addition, these regulations could be void for overbreadth. *See generally Bigelow v. Virginia*, 421 U.S. 809 (1975). Because the Commission has chosen to restrict speech to the descriptions on its final list, it has by negative implication prohibited an entire class of descriptions that, while not on the approved list, are nonetheless truthful and non-misleading.

Finally, the regulations could be unconstitutionally vague. *See NEA v. Finley,* 118 S.Ct. 2168, 2179 (1998) (" The First and Fifth Amendments protect speakers from arbitrary and discriminatory enforcement of vague standards.") (citing *NAACP v. Button*, 371 U.S. 415, 432-433). The standard for speech prohibited as "misleading" is speech that "state[s] or impl[ies] that the carrier has no choice regarding whether or not such a charge must be included on the bill or the amount of the charge." *Supra* at para. 56. Needless to say, this standard is subjective, undefined, and vague, making it very difficult for regulated entities to know *ex ante* how they can safely describe the charges.